Office - Supreme Court, U.S.
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82-79

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CIRO D'AMBROSIO, PETITIONER

V.

BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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STEPHEN E. KLAUSNER, OF COUNSEL
JANE Z. LIPSET, ON THE PETITION

QUESTION PRESENTED

Whether petition was denied his right to due process of law under the Fourteenth Amendment when his amended petition, filed with the New Jersey Commissioner of Education, alleging employment discrimination on the basis of national origin, was dismissed on its face on the ground that it was insufficient.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioner Ciro D'Ambrosio prays that a writ of certiorari issue to review the order of the New Jersey Supreme court in this case.

OPINIONS BELOW

There was no opinion of the Supreme Court of the State of New Jersey. The order denying the petition for certification (Appendix A) has not yet been reported.

The opinion of the New Jersey Superior Court, Appellate Division (Appendix B) was not reported.

The decisions of the New Jersey State Board of Education (Appendix C), the Commissioner of Education (Appendix D), and the Administrative Law Judge (Appendix E), have not yet been reported.

JURISDICTION

The Order of the New Jersey Supreme Court was entered on March 24, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, Ciro D'Ambrosio, a non-tenured teacher with Respondent Board of Education of the Warren Hills Regional School District, Warren County, New Jersey, was advised in April, 1978 that his contract would not be renewed. The reasons set forth were lack of acceptable performance in verbal presentation of the subject matter, and in English enunciation. For unspecified reasons, respondent nevertheless rehired petitioner for the 1978-1979 school year. In April, 1979 respondent again informed petitioner that his contract would not be renewed. This time, the reasons given were unsatisfactory teaching performance.

Petitioner filed a Petition of Appeal and an Amended Petition of Appeal (Appendix F, 25a) with the New Jersey Commissioner of Education, pursuant to N.J.S.A. 18A:6-9, which gives the Commissioner jurisdiction

to hear and determine all controversies and disputes arising under the school laws. (It is undisputed that the Commissioner has jurisdiction concurrent with that of the New Jersey Division on Civil Rights, N.J.S.A.10:5-1 et seq., to hear a teacher's complaint of illegal employment discrimination.)

The Amended Petition stated that petitioner's evaluations had contained criticism of his ability to speak and use the English language, and alleged that:

> "The reasons proffered by respondent are knowingly and intentionally false, discriminatory and violated petitioner's constitutional statutory rights not to be discriminated against because of his national origin, Italian.
>
> Further respondent's action was in retaliation for his successfully petitioning respondent to renew him for school year 1978-1979." (28a-29a)

Pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., the matter was referred

to the Office of Administrative Law. The Administrative Law Judge recommended that the Amended Petition be dismissed on the ground that it contained only "bare and generalized allegations unsupported by specific facts" (23a). On appeal, the Commissioner of Education reversed and remanded for a hearing because of the "paucity of the record" (13a).

> "The Commissioner directs that, in the circumstances of this case, in addition to the regular court stenographer the court use a tape recorder with good sound resolution and with high tonal quality to compile a good acoustical record of petitioner's speech". (13a)

Respondent appealed to the State Board of Education which reversed the Commissioner's decision "for the reasons expressed in the Administrative Law Judges (sic) decision" (10a).

Petitioner appealed to the New Jersey Superior Court, Appellate Division, which affirmed the State Board. The Court noted

that "(p)etitioner had no right to have his contract renewed" (5a), and concluded:

> "On his administrative appeal, even after amending his affirmative pleading, petitioner came forward with only a bare allegation of discrimination because of national origin and a bare claim of retaliatory nonrenewal. On this record the Administrative Law Judge could properly find that petitioner had not "presented a bona fide claim of constitutional stature" and that he was not "entitled to a full evidentiary hearing." Winston [(v.Board of Education of South Plainfield)], supra, 125 N.J. Super. [131 (App. Div. 1973, aff'd 64 N.J. 582 (1974)] at 145. Since the Judge's finding was legally sound, we cannot say that the State Board's ruling "that petitioner had failed to sustain the allegations that his nonrenewal was solely for reasons of his ethnic background" was arbitrary, capricious, unreasonable or contrary to law. As the State Board correctly stated, "it is not appropriate for the Commissioner in a nonrenewal case to substitute (his) judgment for that of the local board." (7a)

Petitioner filed a Petition for Certification with the New Jersey Supreme Court, which was denied without an opinion. (1a)

REASONS FOR GRANTING THE PETITION.

Petitioner, Ciro D'Ambrosio, was denied his right to due process of law under the 14th Amendment to the United States Constitution when his amended petition, filed with the New Jersey Commissioner of Education, alleging employment discrimination on the basis of nationality, was dismissed without a hearing or any investigation. Under this Court's recent decision in Logan v. Zimmerman Brush Company, 102 S.Ct.1148 (1982), the petitioner in the instant case has a protected interest and a right to due process.

In Logan, supra, as in the instant case, the petitioner made a charge of unlawful employment discrimination before a state agency. In Logan, supra, the state statute required the Fair Employment Practices Commission to convene a fact finding conference within 120 days of the

date the charge was filed. The Commission inadvertently failed to do so and the state Supreme Court determined that the legislative directive was mandatory and jurisdictional, and Logan's charge had to be dismissed.

This Court stated at the outset that Logan did have a protected interest.

> "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." (Citations omitted). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." (Citations omitted).
>
> The right to use the FEPA's (Fair Employment Practices Act) adjudicatory procedures shares these characteristics. A claiment has more than an abstract desire or interest in redressing his grievance. His right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence." 102 S.Ct. at 155.

Similarly in the instant case, petitioner Ciro D'Ambrosio's right to use the adjudicatory procedures of the New Jersey Department of Education is a protected interest. As in Logan, supra, the petitioner in the instant case claims employment discrimination, here on the basis of nationality, in violation of both the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2,000e-1 et seq. Petitioner D'Ambrosio is therefore entitled to have the adequacy of this claim assessed under a "for cause" standard, based upon the substantiality of the evidence. This was not done in the instant case.

As to what process is due, the Court in Logan said:

> "(T)he Due Process Clause grants the grieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "some form of hearing" is

required before the owner is finally deprived of a protected property interest. Board of Regents v. Roth, 408 U.S. [564(1972)] at 570-571, n.8 (Emphasis in original)." 102 S.Ct. at 1156.

". . .Logan is entitled to have the commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and - more intangibly in redressing an instance of alleged discrimination, are all substantial. Id. at 1157.

Petitioner D'Ambrosio, like Logan, was deprived of any form of hearing. He did not have the opportunity to present his case. The merits were not considered, and no evidence was submitted.

In the instant case, the conclusions of the Administrative Law Judge and the New Jersey Superior Court, Appellate Division, that the amended petition was insufficient, were eroneous. The amended petition stated:

10. On or about March 16, 1979, Respondent informed Petitioner that it would not renew his contract as a teacher for school year 1979/1980. The reasons proffered for non-renewal were:

1. Lack of contemporary communications with students.
2. Inability to establish himself as the authority figure in class.
3. Student control is not always satisfactory.
4. Students are confused as to the expectations of teacher. This confusion existed in both academic and behavior matters.

11. The reasons proffered by respondent are knowingly and intentionally false, discriminatory and violated petitioner's constitutional and statutory right not to be discriminated against because of his national origin, Italian.

12. Further respondent's action was in retaliation for his successfully petitioning respondent to renew him for school year 1978-79. (28a-29a)

It is respectfully submitted that these allegations are sufficient to set forth a cause of action for discrimination on the basis of national origin, as well as retaliation.

The Appellate Division, like the Administrative Law Judge, relied on the rhetoric in Winston v. Board of Education of South Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd 64 N.J. 582 (1974):

> "(T)he bare assertion or generalized allegations of a constitutional right does not create a claim of constitional dimensions."

The Appellate Division concluded, on the basis of this statement, that the decision of the Administrative Law Judge was "legally sound" (7a). However, an analysis of Winston, supra, which was lacking from the decisions of both the Administrative Law Judge and the Appellate Division, shows that the opinion in Winston, supra, supports the position of petitioner in the instant case, that he is entitled to a hearing.

In Winston, supra, petitioner, a non-tenured teacher was not renewed; an evaluation report of her noted that she had been "overly critical of administrative policy and action." 125 N.J. Super. at 135. She filed a grievance pursuant to the parties' collective bargaining agreement, but the Chancery Division (of the New Jersey Superior Court) stayed arbitration pending exhaustion of administrative remedies. Petitioner thereafter appealed to the Commissioner of Education, alleging that she was penalized for exercise of her First Amendment right to free speech. The Commissioner of Education dismissed her Petition, and the State Board of Education affirmed. The Appellate Division held that

petitioner was entitled to a plenary hearing.

> "Here, Winston has made a sufficient showing that the decision by the respondent local board may have been prompted by her exercise of the right of free speech protected under the First and Fourteenth Amendments. In this sense she presented a bona fide claim of constitutional stature and was, therefore, entitled to a full evidentiary hearing on this contention before the Commissioner of Education." (125 N.J. Super at 145)

In the instant case, as in Winston, supra, there was a sufficient showing that the decision of respondent local Board may have been prompted by petitioner's national origin. Winston, in her petition, specified instances in which she had asserted her right to free speech. Similarly, petitioner in the instant case specified instances in which his language proficiency was severely criticized. In Winston, supra, an

evaluation of Petitioner, through "Administrator's remarks," criticized her for exercise of her right to free speech. In the instant case, petitioner was non-renewed in the spring of 1978 for alleged language deficiency, but the local Board reversed this decision, for reasons which it significantly would not set forth, and rehired petitioner for the 1978-1979 school year. Just as the allegations of Winston's petition raised an inference that she was non-renewed for improper reasons, similarly the allegations of the petition in the instant case raise such an inference.

The Supreme Court, affirming the Appellate Division opinion in Winston, supra, said:

> "We agree and consider the Appellate Division's approach to have been compatible with settled procedural philosophies in the treatment of motions for dismissal and summary judgement. (Citations omitted)" 64 N.J. at 586.

In the instant case, the approach of the Appellate Division was incompatible with the policy and applicable standards governing motions for dismissal. On a motion challenging the legal sufficiency of a complaint,

> "The Plaintiff is entitled to a liberal interpretation of its contents and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn from them." Burg v. State, 147 N.J. Super. 316, 319-320 (App. Div. 1977), certif. den. 75 N.J. 11 (1977).

The New Jersey Supreme Court has applied this standard consistently. Small v. Rockfeld, 66 N.J. 231, 234 (1974); Hackensack v. Rubinstein, 37 N.J. 39, 51

(1962); Rappaport v. Nichols, 31 N.J. 188, 192 (1959).

This Court has also applied the same standard consistently. In Conley v. Gibson, 355 U.S. 45 (1957), black employees asked that their collective bargaining agent be compelled to represent them fairly, under the Railway Labor Act. The Court refused to dismiss the complaint on the ground that it was inadequate.

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit." 355 U.S. at 45-46

In the instant case, if petitioner can prove his allegations in his amended complaint that the reasons profferred by respondent, the local board of education, for non-renewing petitioner were false and in violation of petitioner's right to freedom from discrimination of the basis of national origin, he can make out a valid claim. There is a set of facts in support of D'Ambrosio's claim which would entitle him to relief. Neither the Adminstrative Law Judge nor the Appellate Division in the instant case utilized the proper standard, allowing petitioner a liberal interpretation of the contents of the amended petition, and the benefit of all its allegations, as well as the favorable inferences which may be drawn therefrom.

This Court has subsequently used the standard set forth in Conley v. Gibson, supra. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court said:

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence whether by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." 416 U.S. at 236

Accord, McClain v. The Real Estate Board of New Orleans, Inc., 100 S.Ct. 502, 511 (1980).

In Lucido v. Cravath, Swain and Moore, 425 F.Supp. 123 (S.D.N.Y. 1977), this standard was applied in an action involving employment discrimination on the basis of national origin. The court said:

"Lucido in his complaint alleges that as an employee of Cravath he was discriminated against with respect to work assignments, training, rotation and outside work opportunities. These claims constitute allegations of discrimination with respect to 'terms, conditions, or privileges of employment' and 'employment opportunities' under Title VII. While these allegations are general and indefinite, mere vagueness or lack of detail is not grounds for dismissal of

the complaint." (Citations omitted; emphasis added) (Id. at 127).

The Appellate Division in the instant case emphasized that petitioner's "1978-1979 evaluations document (his) performance as mediocre to average. He was given a second chance when the local board rehired him for that term and apparently didn't improve to their satisfaction." (6a). However, it seems obvious that an employer engaging in unlawful discrimination would assert that the reason for its adverse action was unsatisfactory job performance. Is it necessary for an employer to admit discrimination before such a cause of action will be considered? In Logan v. Zimmerman Brush Company, supra, 102 S.Ct. 1148, this Court set forth, among Logan's substantial interests, his interest "in disproving his employer's charges of incompetence." Id at 1157.

The petitioner, Ciro D'Ambrosio, seeks only a hearing so that a determination as to whether or not he was discriminated against may be made on the basis of the facts. The Appellate Division complained that the record lacked "information as to (petitioner's) background, age, employment history etc." (4a). The Appellate Division also noted that the reasons why respondent local board reneged on its decision to non-renew petitioner in April 1978 were "unspecified" (4a). Apparently, the Appellate Division felt these facts were significant. They would be fully explored at a plenary hearing. In the interest of justice a litigant should not be denied the opportunity to present the facts, only to have his appeal denied because the facts were not presented.

The Administrative Law Judge in the instant case reasoned:

> "A teacher's deficiency in speaking and using the English language would certainly seem to be a ground for non-renewal of his contract irrespective of his national origion. Similarly, it would be illogical to conclude that either a Chinese, Russian, Hungarian, Israeli or Egyptian teacher, by way of example, who was deficient in English speaking or usage, and who was not re-employed, was being discriminated against because of his national origin." (20a)

The Appellate Division felt that the Administrative Law Judge's decision was "legally sound." However, it is submitted that a discrimination on account of foreign accent, regardless of which accent or nationality is in question, does indeed constitute improper discrimination on the basis of national origin. A Chinese, Russian, Hungarian, Israeli or Egyptian teacher who was terminated because of his or her accent, when he or she was not, in fact, deficient in English speaking or usage, would be the victim of illegal discrimination on the basis of his or her

Chinese, Russian, Hungarian, Israeli or Egyptian origin.

Moreover, the Administrative Law Judge failed to deal with petitioner's allegation that his speaking and usage of the English language is not at all deficient. In determining whether to grant the Motion to Dismiss, the Administrative Law Judge should have accepted the allegations of the petition as true. However, he failed to do so, and assumed that petitioner was actually deficient in his language without giving petitioner the opportunity to prove to the contrary. This was a finding of fact unsupported by any evidence in the record. Quinlan v. Board of Education, 73 N.J. Super. 40, 46 (App. Div. 1962).

Finally, this Court's recent decision in Kremer v. Chemical Construction Corporation, 28 FEP Cases 1412 (May 24, 1982,) is significant in the instant case. Kremer, an employee who was laid off but

not rehired, filed an employment discrimination charge with the EEOC, which was referred to the New York State Division of Human Rights. After investigating, the SDHR determined that there was no probable cause to believe that the employer had violated the New York Human Rights Law. The New York Human Rights Appeal Board upheld this decision, as did the New York Appellate Court. The petitioner then determined to pursue his cause in the EEOC. Again, there was a finding of no reasonable cause. Kremer brought an action under Title VII in the Federal District Court. This Court held that the state court's determination was res judicata under 28 U.S.C. Section 1738, requiring United States courts to afford the same full-faith-and-credit to state court judgments that would apply in the state's own courts. Thus, Kremer was precluded from pursuing

his employment discrimination action in the federal courts.

In the instant case, petitioner D'Ambrosio has no other way in which to pursue his employment discrimination claim. Under the holding of Kremer, supra, he cannot go to the EEOC, and on to federal courts, if necessary, to pursue his claim. The state court decisions are res judicata. The Court in Logan v. Zimmerman Brush Company, supra, 102 S.Ct. 1448 (1982) also considered the availability of other means of relief to petitioner Logan, and concluded that there were none that were not unduly speculative. Id at 1157 to 1158.

In Kremer, supra, the Court specifically rejected Kremer's contention that the procedures under New York law were inadequate. The Court could not apply 28 U.S.C. Section 1738 unless "the party against whom the earlier decision is

asserted had a full and fair opportunity to litigate the claim. (Citation omitted)." 28 FEP Cases at 1421. These requirements were satisfied since the finding of no probable cause came after an investigation, in which the claimant was entitled to an opportunity to present exhibits and the testimony of witnesses, as well his own testimony, informally. He was also afforded an opportunity to rebut evidence submitted by the respondent.

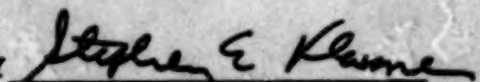
The petitioner in the instant case was afforded none of these advantages. His amended petition was dismissed on its face for failure to state a claim. Under Kremer, supra, he is allowed no other means of pursuing his claim. It is respectfully submitted that D'Ambrosio was denied his 14th amendment right to due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KLAUSNER & HUNTER

BY 
Stephen E. Klausner

DATE: June 18, 1982

SUPREME COURT OF NEW JERSEY
C-454 SEPTEMBER TERM 1981

CIRO D'AMBROSIO,	:	19,155
Petitioner-Appellant,	:	ON PETITION FOR CERTIFICATION
v.	:	
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY.	:	FILED SUPREME COURT MARCH 24, 1982 STEPHEN TOWNSEND D2 CLERK
Defendant-Respondent.	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-519-80T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 22nd day of March, 1982.

Clerk

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTED ON OPINIONS

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-519-80T3

CIRO D'AMBROSIO,

Petitioner-Appellant.

v.

BOARD OF EDUCATION OF THE
WARREN HILLS REGIONAL
SCHOOL DISTRICT, WARREN COUNTY,

Respondent-Respondent.

Argued: October 5, 1981 - Decided: October 22, 1981 Before Judges Bischoff and King.
On appeal from the State Board of Education.

Stephen E. Klausner argued the cause for appellant (Klausner & Hunter, attorneys; Jane Z. Lifset, on the brief).

David A. Wallace argued the cause for respondent (Aron, Till & Salsberg, attorneys).

James J. Zazzali, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

Petitioner-apellant, a non-tenured public school teacher, claims a wrongful refusal to renew his teaching contract for a third year because of his national origin, Italian. He further claims a retaliatory firing because he was successful in persauding the School Board to renege on its refusal to rehire him for the prior year, 1978-1979.

The Commissioner assigned the case to the Office of Adminstrative Law as a contested matter pursuant to N.J.S.A. 52:14F-1, et seq. Petitioner was ordered by the administrative law judge to file an amended petition containing a more definite contention. Thereafter the amended petition was dismissed by the judge because "[r]eading the amended petition in a light most favorable to petitioner, and giving petitioner the benefit of every reasonable doubt, the amended petition still contains

nothing but bare and generalized allegations unsupported by specific facts."

The Commissioner of Education, out of concern with the paucity of the record, remanded the case for a plenary hearing. The local board appealed to the State Board which unanimously reversed the Commissioner for "the reasons expressed in Administrative Law Judge's decision." Petitioner appeals from the State Board's decision; we affirm.

Petitioner, of Italian birth, possesses a teaching certificate from the State Department of Education. He has a master's degree in nuclear physics from Rutgers University. The record reveals no other information as to his background, age, employment history, etc. He was employed by the local board for 1977-1978 as a high school physics teacher. His contract was originally not renewed for these reasons.

Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension.

Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials.

For unspecified reasons the local board reneged on this nonrenewal and he was rehired for the 1979-1980 term to teach physical science at the junior high school level. He was notified in April 1979 of his nonrenewal because

The reasons your contract was not renewed for the 1979/80 are as follows:

(1) Lack of contemporary communication with students.

(2) Inability to establish yourself as the authority figure in class.

(3) Student control is not always satisfactory.

(4) Students are confused as to the expectations of teacher. This confusion existed in both academic and behavior matters.

The record contains seven written classroom evaluations, six average and one below average, for the 1978-1979 term. Two mention petitioner's problem with the English language, several suggest problems in his organizaiton and control of his class.

Petitioner had no right to have his contract renewed. In Re Board of Ed. of City of Englewood, 150 N.J. Super. 265 (App. Div. 1977), certif. den. 75 N.J. 525 (1977). The local Board must, if asked, give nonrenewed nontenured teachers a statement of reasons why a new contract was not offered. Donaldson v. Bd. of Ed. of N. Wildwood, 65 N.J. 236 (1974). Nonretention may not be based on constitutionally impermissible grounds, such as invidious discrimination or the exercise of First Amendment rights. Id. at 242-243. But we have stated "that the bare assertion or generalozed allegations

of a constitutional right does not create a claim of constitutional dimensions." Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd 64 N.J. 582 (1974). In the present case the local board specifically stated the grounds for nonrenewal. The 1979-1979 evaluations document petitioner's performance as mediocre to average. He was given a second chance when the local board rehired him for term and apparently didn't improve to their satisfaction.

On his administrative appeal, even after amending his affirmative pleading, petitioner came forward with only a bare allegation of discrimination because of national origin and a bare claim of retaliatory nonrenewal. On this record the administrative law judge could properly find that petitioner had not "presented a bona fide claim of constitutional stature" and that he was

not "entitled to a full evidentiary hearing." Winston, supra, 125 N.J. Super. at 145. Since the judge's finding was legally sound, we cannot say that the State Board's ruling "that petitioner had failed to sustain the allegations that his nonrenewal was solely for reasons of his ethnic background" was arbitrary, capricious, unreasonable or contrary to law. As the State Board correctly stated, "it is no appropriate for the Commissioner in a nonrenewal case to substitute [his] judgment for that of the local board."

We also are satisfied that petitioner was adequately afforded the right to a full presentation before the State Board. Clearly, the State Board had the opportunity to review the legal and factual record made before the administrative law judge and before the Commissioner. In the context petitioner's

right under N.J.S.A. 52:14B-10(c) to be heard was satisfied.

We reject petitioner's argument that the local board had no right to appeal the Commissioner's interlocutory order remanding the matter for a full hearing. The applicable statute clearly states that "any party aggrieved by any determination of the commissioner" may appeal to the State Board. N.J.S.A. 18A:6-27. (Emphasis supplied.)

We also find petitioner's final argument without merit. He contends that the failure of the State Board to act within 45 days requires adoption of the Commissioner's ruling. Even if the State Board is considered "the head of the agency" within N.J.S.A. 52:14B-10(c), the lack of timely action results in an adoption of the decision of the administrative law judge as the "final decision," not the Commissioner's

decision. Since the judge's decision was adverse to the petitioner any alleged admnstrative irregularity was harmless.

Affirmed.

Appendix C

CIRO D'AMBROSIO, :

PETITIONER-APPELLEE, STATE BOARD OF EDUCATION

V.

BOARD OF EDUCATION OF THE WARREN HILLS : DECISION
REGIONAL SCHOOL
DISTRICT, WARREN :
COUNTY,

RESPONDENT-APPELLANT:

Decided by the Commissioner of Education, March 24, 1980.

For the Petitioner-Appellee, Stephen E. Klausner, Esq.

For the Respondent-Appellant, Dorf, Wallace & Glickman (David A. Wallace, Esq., of Counsel)

The State Board of Education reverses the Commissioner's decision for the reasons expressed in the Adminstrative Law Judges decision.

October 1, 1980

Date of Mailing 10/3/80

OAL DKT. NO. EDU 3061-79

CIRO D'AMBROSIO, :
PETITIONER :
: COMMISSIONER OF
: EDUCATION
V. :

BOARD OF EDUCATION
OF THE WARREN HILLS : DECISION
REGIONAL SCHOOL :
DISTRICT WARREN
COUNTY, :

RESPONDENT.

:

The Commissioner has reviewed the record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner notes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner observes that two of the resons expressed to petitioner by the Board when it informed him it intended not

to renew his contract as a teacher for the school year 1978-79 were:

> "A. Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension.
>
> "B. Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials."

The Commissioner notes that the Board reversed itself after a special meeting and offered petitioner reemployment for the 1978-79 school year. The record is devoid of the reason(s) for the Board's reversal nor does the record show that such a decision was motivated by improvement in petitioner's verbal presentation and English enunciation. The Commissioner notes that references was made during the school year 1978-79 to petitioner's problem of language.

The Commissioner observes that the record before him, while referring to deficiencies in English enunciation and usage, gives no examples or verification of such allegations. Nor is there in the record evidence of any standards of usage applied nor is there expressed therein the opinions of any language experts. The decision is based solely on the written record and a Motion to Dismiss.

Petitioner contends that the Board erred in its determination that he was not competent in language usage. He alleges that he has mastery of the language and that the nonrenewal was a subterfuge.

The Commissioner is concerned with the paucity of the record in this matter and accordingly remands this decision to the Office of Adminstrative Law for a full hearing. The Commissioner directs that, in the circumstances of this case, in addition to the regular court stenographer

the court use a tape recorder with a good sound resolution and with high tonal quality to compile a good acoustical record of petitioner's speech.

It is so directed.

COMMISSIONER OF EDUCATION

March 24, 1980 Date of Mailing 3/26/80

IN RE: CIRO D'AMBROSIO	)	INITIAL DECISION
	)	O.A.L. DKT. NO. E.D.U. 3061-79
V.	)	AGENCY DKT. NO. 287-7/79A
BOARD OF EDUCATION WARREN HILLS REGIONAL, HUNTERDON COUNTY, NEW JERSEY	)	

APPEARANCES:

Stephen E. Klausner, Esq., for Petitioner

David A. Wallace, Esq., for Respondent

BEFORE THE HONORABLE ROBERT P. GLICKMAN, A.L.J.:

This matter comes before the Court on respondent's motion to dismiss petitioner's amended petition pursuant to N.J.A.C. 6:24-1.10 on the grounds that no sufficient cause for determination has been advanced. Respondent has submitted a letter memorandum dated January 11, 1980 in support of its motion and also relies on its brief in support of its motion directed at the original petition.

Petitioner relies on a letter memorandum dated January 24, 1098 in opposing respondent's motion to dismiss.

The following procedural history of this matter is relevant:

1. The original petition of appeal was filed with the commissioner of Education on or about July 17, 1979.

2. An answer was filed on behalf of respondent on or about August 2, 1979.

3. This matter was then transmitted to the Office of Adminsitrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

4. A prehearing conference was held at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey on October 23, 1979.

5. On or about November 1, 1979 respondent filed a notice of motion to, among other things, dismiss the petition on the grounds that no sufficient cause for determination has been advanced.

6. On or about November 16, 1979 petitioner filed a letter memorandum in opposition to respondent's motion.

7. On or about November 19, 1979 this Court ordered that petitioner file an amended petition containing a more definite statement.

8. On or about November 29, 1979 petitioner filed an amended petition of appeal.

9. On or about January 11, 1980 respondent filed a letter memorandum in lieu of formal notice of motion and brief moving to dismiss petitioner's amended petition pursuant to N.J.A.C. 6:24-1.10 on the grounds that no sufficient cause for determination has been advanced.

10. On January 24, 1980 petitioner submitted a letter memorandum in opposition to respondent's motion to dismiss the amended petition.

In determining whether or not the amended petition should be dismissed on the grounds that there is no sufficient cause for determination, this Court has carefully read and reread the amended petition which it shall summarize as follows:

1. The first paragraph indicates that the petitioner is a non-

tenured teacher employed by respondent;

2. The second paragraph indicates that the respondent is responsible for the operation of and supervision of Warren Hills Regional Schools;

3. The third paragraph indicates that by letter dated April 6, 1978 respondent informed petitioner that it would not renew his contract as a teacher for the second year 1978/79 for the reasons that:

   A. "Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension."

   B. "Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials."

4. Paragraph four indicates that on May 9, 1978, after a special meeting, the respondent reversed itself and offered petitioner re-employment for the 1978/79 school year.

5. Paragraph five indicates that petitioner was reassigned on or about May 18, 1978 to its junior high school where he would teach

general science during 1978/79. It was also pointed out that petitioner held a Master's Degree from Rutgers University in nuclear physics.

6. Paragraph six indicates on or about May 18, 1978 petitioner's chairperson, Harold Musselman, informed petitioner that the transfer was the first step toward his non-renewal for the school year 1979/80.

7. Paragraph seven indicates that petitioner's evaluations contain criticism of his ability to speak and use the English language.

8. Paragraph eight indicates that on or about September 21, 1978 petitioner's new chairperson evaluated him with the comment that, "taking lessons to improve his English."

9. Paragraph nine indicates that in an October 5, 1978 evaluation, it was pointed out that petitioner had a problem of language and that it was difficult to understand some of his statements.

10. Paragraph ten indicates that respondent informed petitioner on or about March 16, 1978 that it would not renew his contract for the 1979/80 school year for the following reasons:

A. "Lack of contemporary communication with students."

B. "Inability to establish himself as the authority figure in class."

C. "Student control is not always satisfactory."

D. "Students are confused as to the expectations of teacher. This confusion existed in both academic and behaviour matters."

11. Paragraph eleven indicates that the reasons proferred by respondent were knowingly and intentionally false, discriminatory and violated petitioner's constitutional and statuatory rights not to be discriminated against because of his national origin, Italian.

12. Paragraph twelve indicates that respondent's actions were in retaliation for petitioner's successfully petitioning respondent to renew him for school year 1978/79.

Petitioner then sought the following relief in this amended petition:

A. Directing respondent to reinstate petitioner to a teaching position for the school year 1979/80.

B. Directing respondent to cease and desist from illegally discriminating against petitioner because of his national origin.

C. Such other and further relief as the Commissioner deems just and proper.

The thrust of petitioner's petition is that the Board discriminated against him because of his national origin. It is only in paragraph eleven of the petition, for the first time, that one learns that petitioner's national origin is Italian. None of the factual allegations set forth before paragraph eleven, directly or indirectly, indicate that the actions of the Board against petitioner are based on his Italian origin. Additionally, no inference can be drawn from any of the factual allegations which would indicate that the Board discriminated against petitioner because of his Italian origin. This Court is unable to infer from the fact that the Board gave petitioner a

negative evaluation based upon his inability to speak and use the English laguage that it was disciminating against him based upon his Italian origin. A teacher's deficiency in speaking and using the English language would certainly seem to be a ground for non-remewal of his contract irrespective of his national origin. Similarly, it would be illogical to conclude that either a Chinese, Russian, Hungarian, Israeli or Egyptian teacher, by way of example, who was deficient in English speaking or usage, and who was not re-employed, was being descriminated against because of his national origin. It follows, therefore that the general allegation contained in paragraph eleven is totally insufficient.

Petitioner was afforded an opportunity to amend his petition to cure the vague and general allegations contained therein. Petitioner's amended

petition does not accomplish this. Respondent is entitled to defend against specific acts, not vague generalities.

In Winston v. Board of Ed. of So. Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974) the Court discussed whether a petition which contained nothing more than naked allegations was subject to dismissal on its face. In Winstson, supra, the Appellate Division clearly stated that:

> "It may be acknowledged that the bare assertion or generalized allegation of infringement of a constitutional right does not create a claim of consititutional dimensions."

125 N.J. Super at 144. Additionally, the Commissioner has held that where a petition lacks the required supportive detailed factual allegations, the petition should be dismissed. John C. Roy, II v. Board of Education of the Township of

Middle, Cape May County, 1976 S.L.D. 569, 572 aff'd State Board of Education, 1976 S.L.D. 574; Dee Foster and The Neptune Education Association v. Board of Education of the Township of Neptune, Monmouth County, 1976 S.L.D. 693. In addition, as stated in Alice W. Cardman, et al v. Board of Education of the Township of Millburn, Essex County, 1977 S.L.D. 746, 749-50:

> "...in the absence of specific allegations with respect to petitioner's conclusion that the Board's action of not reemploying her was based on constitutionally proscibed reason, an adversary hearing is not warranted."

Also, the Commissioner in the case of Barbara Hicks, v. Board of Education of the Township of Pemberton, Burlington County, 1975 S.L.D. 332, 336 stated:

> "When a teaching staff member alleges that a local Board of Education has refused re-employment for proscribed reasons (i.e. race, color, religion, etc.) or in violation of

constitutional rights such as free speech, or that the Board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a petition of appeal before the Commissioner which will result in a full adversary proceeding..." (Emphasis added).

Applying the well-established principals of law just enunciated to the facts in the instant case, it is clear that the amended petition must be dismissd. Reading the amended petition in a light most favorable to petitioner, and giving petitioner the benefit of every reasonable inference, the amended petition still contains nothing but bare and generalized allegations unsupported by specific facts.

Accordingly, it is **CONCLUDED** that respondent's motion to dismiss petitioner's amended petition on the grounds that no sufficient cause for

determination has been advanced be and is hereby granted.

It is, therefore, **ORDERED** that petitioner's amended petition be and is hereby **DISMISSED** without prejudice.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

I HEREBY FILE with the **COMMISSIONER OF EDUCATION, FRED G. BURKE**, my Initial Decision in this matter and the record in these proceedings.

February 6, 1980
DATE

ROBERT P. GLICKMAN,
A.L.J.

Receipt Acknowledged:

February 8, 1980
DATE

AGENCY HEAD

Mailed to Parties:

February 11, 1980
DATE

OFFICE OF ADMIN. LAW
Appendix F

Office of Administrative Law
Filed - Trenton, N.J.
November 29, 1:45 PM 179

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Petitioner,CIRO D'AMBROSIO
OF EDUCATION

against

Respondent, BOARD OF EDUCATION WARREN HILLS REGIONAL, HUNTERDON COUNTY, NEW JERSEY

BEFORE THE COMMISSIONER

OF NEW JERSEY

AMENDED PETITION OF APPEAL

DOCKET NO. EDU. 3061-79

Petitioner, Ciro D'Ambrosio, residing at 112 Merriam Avenue, Newton, New Jersey, hereby requests the Commissioner to hear

and determine the within controversy under School Law (N.J.S.A. 18A: 6-9) by reason of the following facts:

1. Petitioner, Ciro D'Ambrosio, is a non-tenured teacher employed by Respondent.

2. Respondent, Board of Education of Warren Hills Regional, Warren County, New Jersey is responsible for the operation of and supervision of Warren Hills Regional Schools.

3. By letter dated April 6, 1978, Respondent informed Petitioner that it would not renew his contract as a teacher for school year 1978/1979. The reasons proffered for non-renewal were:

> Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension.
>
> Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials.

4. On or about May 9, 1978, after a special meeting, Respondent reversed itself and offered Petioner re-employment for the 1978-1979 school year.

5. Despite the fact that petitioner has a Master's Degree from Rutgers University in Nuclear Psychics, on or about May 18, 1978 respondent re-assigned petitioner to its Junior High School and informed him that for school 1978-1979 he would be teaching General Science.

6. On or about May 18, 1978 petitioner's then Chairperson, Harold Musselman informed Petitioner that the transfer was the first step toward his non-renewal for school year 79-80 and warned him to be on guard.

7. Almost from the outset, despite the fact that petitioner had a new chairperson who had not been privy to the incidents of the previous Spring, petitioner's evaluations contained

criticism of his ability to speak and use the English language.

8. On or about September 21, 1978 petitioner's new Chairperson evaluated him with a comment that "taking lessons to improve his English".

9. On or about October 5, 1978 set of evaluators stated that in an evaluation of said date that "D'Ambrosio's only significant problem as I see it is one of language. Although he speaks carefully and slowly, it was difficult to understand some of his statements. This language problem did force the students to be more attentive and in this class, may actually help in terms of behavior."

10. On or about March 16, 1979, Respondent informed Petitioner that it would not renew his contract as a teacher for school year 1979/1980. The reasons proffered for non-renewal were:

1. Lack of contemporary communication with students.
2. Inability to establish himself as the authority figure in class.
3. Student control is not always satisfactory.
4. Students are confused as to the expectations of teacher. This confusion existed in both academic and behavior matters.

11. The reasons proffered by respondent are knowingly and intentionally false, discriminatory and violated petitioner's constitutional statutory rights not to be discriminated against because of his national origin, Italian.

12. Further respondent's action was in retaliation for his successfully petitioning respondent to renew him for school year 1978-79.

WHEREFORE, Petitioner prays for an Order:

a. Directing Respondent to reinstate Petitioner to a teaching postition for school year 1979/1980;

b. Directing Respondent to cease and desist from illegally discriminating against Petitioner because of his national origin.

c. Such other and further relief as to the Commissioner seems just and proper.

RESPECTFULLY SUBMITTED,

STEPHEN E. KLAUSNER

DATED: November 23, 1979

No. 80-79

FILED
SEP 8 1980
ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

October Term, 1980

CIRO D'AMBROSIO,

Petitioner,

vs.

BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

BRIEF IN OPPOSITION

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No. 82-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CIRO D'AMBROSIO,

Petitioner,

vs.

BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Statement of the Case

Petitioner, Ciro D'Ambrosio, filed a Petition of Appeal with the New Jersey Commissioner of Education challenging the non-renewal of his teaching contract by the respondent, Board of Education of the Warren Hills Regional School District, Warren County, New Jersey.

The thrust of petitioner's claim was that the respondent failed to renew his contract because of his Italian national origin.

The respondent filed a Motion addressed to the legal sufficiency of the petitioner's pleading, arguing that petitioner's Petition of Appeal should be dismissed for failure to state a claim. The respondent relied upon a long line of decisions of the New Jersey Commissioner of Education, the New Jersey State Board of Education, and the New Jersey courts, holding that under New Jersey pleading standards a pleading is legally insufficient if it merely contains a generalized conclusionary allegation. Rather, to be legally sufficient the pleading must contain detailed specific factual allegations which are supportive of the generalized conclusionary allegation.

In response to the respondent's Motion, the petitioner sought leave to file an Amended Petition of Appeal adding allegations of specific overt acts supportive of his general claim of discrimination on account of national origin. The Administrative Law Judge granted the petitioner's request and an Amended Petition of Appeal was filed. The respondent then renewed its Motion to Dismiss, arguing that the additional allegations contained in the Amended Petition of Appeal did not cure the legal insufficiency of the original Petition of Appeal under New Jersey pleading standards. The Administrative Law Judge agreed, and in his Initial Decision determined that the Amended Petition of Appeal failed to comport with well-established New Jersey pleading requirements and thus failed to state a claim. In so holding, the Administrative Law Judge reviewed the pleading standards enunciated in numerous New Jersey cases, analyzed the allegations contained in the Amended

Petition of Appeal, and concluded that the Amended Petition of Appeal was legally deficient since it "contains nothing but bare and generalized allegations unsupported by specific facts."

This ruling of the Administrative Law Judge, based upon well-established New Jersey pleading standards, was ultimately upheld by the New Jersey State Board of Education, the Appellate Division of the New Jersey Superior Court, and at least indirectly by the New Jersey Supreme Court in denying petitioner's Petition for Certification filed with that court.

LEGAL ARGUMENT

POINT I

This Court lacks jurisdiction to review the judgment of the New Jersey Supreme Court on Writ of Certiorari because the Federal question raised in this petition (due process of law under the Fourteenth Amendment) was not timely and properly rasied below.

Petitioner attempts to invoke this Court's jurisdiction under 28 U.S.C.A. §1257(3), pursuant to which this Court may review final judgments rendered by the highest court of a state by Writ of Certiorari where any right, privilege or immunity is claimed under the Constitution of the United States. Petitioner ostensibly bases his Petition jurisdictionally upon his claim of denial of his right to due process of law under the Fourteenth Amendment of the United States Constitution. It is jurisdictionally axiomatic, however, that petitioner must also have properly and timely raised his due process contentions below in order to properly bring this matter to this Court. In this regard the instant Petition is utterly deficient.

In furtherance of the foregoing principles, the Rules of the Supreme Court of the United States specifically require in Rule 21.1(h) as follows:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The instant Petition makes no effort whatsoever to comply with the foregoing requirement. The reason is obvious. The record clearly reveals that the only issue raised below and passed upon below related to the sufficiency of petitioner's pleading under New Jersey pleading standards, having absolutely nothing to do with due process of law under the Fourteenth Amendment. At no point did petitioner claim that the due process clause of the Fourteenth Amendment entitled him to a hearing. Rather, petitioner constantly argued that he was entitled to a hearing by virtue of his understanding of the pleading requirements applicable to New Jersey proceedings. He additionally argued that the pleading standards utilized in comparable Federal cases should serve as persuasive references in determining his plead-

ing contentions under New Jersey law. It must be reiterated, however, that at no point did petitioner previously contend that his claimed entitlement to a hearing on his pleadings would, if denied, implicate the due process clause of the Fourteenth Amendment. The petitioner not having raised his alleged due process rights below, naturally the administrative agency and courts below did not pass upon any such contention.

For the foregoing reasons the instant Petition is jurisdictionally unsound and must be denied for that reason alone.

POINT II

Even if the instant petition is jurisdictionally proper, it nevertheless fails to raise questions warranting this Court's review.

Petitioner's due process contentions totally misconstrue the constitutional due process guarantee. Petitioner appears to argue that the mere dismissal of his pleading for failure to meet New Jersey's established pleading requirements, in and of itself, deprived petitioner of the type of hearing required by the due process clause. This contention is utterly without merit.

The very cases cited by petitioner graphically display the distinction between valid pleading requirements and due process requirements, which distinction has apparently been ignored by petitioner.

The case upon which petitioner places greatest reliance is *Logan* v. *Zimmerman Brush Co.*, 102 S. Ct. 1148 (1982). The petitioner in *Logan* was denied any kind of hearing at

all and was ultimately vindicated by this Court under the due process clause. Petitioner herein claims that he should be treated likewise since he was also deprived of any form of a hearing due to the dismissal of his pleading for failure to conform to New Jersey pleading requirements. Petitioner's attempted analogy is absolutely incorrect. This is clearly shown in *Logan* itself, where this Court states:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, • • •. And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. • • • (102 S.Ct. at 1158) (Emphasis in original; citations omitted).

Indeed, the only possible due process issue in this case is whether the New Jersey pleading requirements, which petitioner failed to meet according to the New Jersey courts, are reasonble. Petitioner never raised this issue below and certainly has made no effort whatsoever in the instant Petition to show unreasonableness, and instead has chosen merely to cite Federal cases ruling upon Federal pleading requirements as though that is relevant to the due process issue. Petitioner has cited: *Conley* v. *Gibson*, 355 U.S. 45 (1957); *Scheur* v. *Rhodes*, 416 U.S. 232 (1974); *McClain* v. *The Real Estate Board of New Orleans, Inc.*, 100 S.Ct. 502, 511 (1980); and *Lucido* v. *Cravath, Swain & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977). All of the foregoing cases are cited for their rulings upon Federal pleading sufficiency, and have absolutely nothing whatsoever to do with New Jersey's pleading procedures or the constitutionality of New Jersey's pleading procedures. Whether or not petitioner's pleadings might have survived a motion to dismiss under the Federal Rules of Civil Procedure is ab-

solutely irrelevant to this case, unless petitioner is somehow arguing that the Federal pleading rules are the only pleading rules which are constitutional under the due process clause. If petitioner is indeed so arguing, he is absolutely wrong.

This Court has long held that due process does not require following the Federal process of law as prescribed for the Federal courts in equivalent Federal litigation. The due process clause does not use the words "due process" as an equivalent for the process of any particular court, state or Federal. Rather, it refers to a standard of process that may cover many varieties of processes that are expressive of different combinations of historical or modern, local or other, juridical standards, provided only that they do not conflict with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions. *Bute* v. *Illinois,* 333 U.S. 640.

There is no question but that the instant pleading was found by the New Jersey administrative and judicial systems to have failed to conform to a long line of educational and judicial decisions concerning pleading requirements in a petition of appeal before the New Jersey Commissioner of Education. Nowhere does (or did) the petitioner argue that these requirements conflict with our fundamental principles of liberty and justice, or that he was unaware of, or surprised by, these standards. Instead he bases his entire argument upon the alleged failure to conform to the pleading standards by which the Federal courts are governed. The Federal pleading standards are totally irrelevant to the constitutional issue raised herein, for it is clear that no particular procedure violates the Fourteenth Amendment simply because another procedure is contended to be fairer or wiser. *Stein* v. *New York,* 346 U.S. 156, rehearing denied 346 U.S. 842.

It is similarly well-established that administrative agencies, such as the New Jersey Commissioner of Education and New Jersey State Board of Education, are not held to strict conformity with judicial procedures required in a court of law. 2 Am Jur 2d, Administrative Law, §414. Thus, even if it is assumed *arguendo* that the New Jersey Department of Education has established pleading requirements that differ from those applicable to similar proceedings in the New Jersey or Federal courts, there is no violation of due process simply because the standards are different. Rather, as stated previously, the standards must be shown to violate fundamental principles of liberty and justice. As previously noted, no such contention, much less showing, has been made by petitioner herein. Certainly the record shows no such infirmity. To the contrary, it is undisputed that the respondent invoked pleading standards set forth in a long line of cases decided by the agency and the state courts, cited those very cases, and the Administrative Law Judge even gave petitioner, at petitioner's request, a second opportunity at meeting those pleading requirements in an amended pleading.

Petitioner also appears to argue that the judgment below is erroneous because it misapplies New Jersey law with regard to appropriate pleading. Respondent is at a loss to comprehend how any such alleged misapplication of state law, in and of itself, would present a Federal question warranting review by this Court. Respondent totally disagrees with petitioner with regard to the alleged misapplication of New Jersey case law. However, since respondent does not believe that such a contention is properly before this Court, respondent will not belabor the point. Suffice it to say that the New Jersey Supreme Court was not inclined to review

this case based upon such contentions of misapplication of New Jersey law, and respondent does not believe that this Court should or could properly attempt to substitute its judgment for that of the highest court of New Jersey with regard to the proper application of New Jersey pleading requirements.

Finally, if this Court harbors the slightest doubt that petitioner's pleading was properly disposed of below, the following matters are presented in support of the propriety of the dismissal of petitioner's claim on respondent's motion.

Petitioner's original Petition of Appeal alleged that Petitioner, a non-tenured teacher employed by respondent, was informed by Respondent in April, 1978 that he would not be re-employed for the 1978-79 school year. The gravamen of the reasons given Petitioner for his non-renewal were his deficiencies in verbal presentation and English enunciation. In May 1978, Respondent changed its mind and did offer Petitioner re-employment for 1978-79.

The original Petition of Appeal went on to allege that during the 1978-79 school year Respondent remained dissatisfied with Petitioner's verbal performance, in that "almost from the outset of school Petitioner's evaluations contained criticism of his speaking". In the spring of 1979, Respondent determined not to re-employ Petitioner for the 1979-80 school year, informing Petitioner that the reasons for his non-renewal were his continued unsatisfactory verbal performance (described as his "lack of contemporary communication"), as well as his inability to establish himself as an authority figure in class, his unsatisfactory student control, and his creation of confusion among the students concerning his expectations in academic and behavior matters.

Finally, the original Petition of Appeal alleged that "the reasons proffered by Respondent are knowingly and intentionally false, discriminatory and violating Petitioner's constitutional rights" and that Respondent's action was in retaliation of his successfully peititioning in 1978 (apparently referring to Respondent's change of heart in the Spring of 1978 as to Petitioner's non-renewal for the 1978-79 school year). Although the original Petition of Appeal contained no further allegations, it is assumed that an additional allegation was intended to be expressed in Petitioner's request for an Order that Respondent "cease and desist from its illegally discriminating against Petitioner because of his national origin."

Petitioner did not need a hearing to establish the facts underlying this dispute. This is clear from a reading of Respondent's Answer and the Pre-Hearing Order, revealing no dispute as to the accuracy of original Petition paragraphs 1 through 6, as amended by the Pre-Hearing Order. It was therefore conceded that Petitioner was a non-tenured teacher, was initially informed of his non-renewal for 1978-79 for the reasons cited in original paragraph 3, was nevertheless re-employed for the 1978-79 school year due to a change of heart by Respondent, was negatively evaluated during 1978-79 due to his speaking deficiencies, and was informed that he would not be re-employed for 1978-80 for the reasons cited in original Petition paragraph 6.

The crux of this case, therefore, was Petitioner's general allegations that his non-renewal was brought about for "knowingly and intentionally false" reasons, that Respondent's actions were "discriminatory and violating Petitioner's constitutional rights" (presumably due to Petitioner's national origin), and that Respondent retaliated against Petitioner for reasons relating to Respondent's change of heart in 1978 concerning his non-renewal for

1978-79. Respondent denied these general allegations. However, Petitioner was not entitled to a hearing on these disputed general allegations, since a long and unbroken line of New Jersey Commissioner of Education and judicial precedents clearly reveals the legal insufficiency of such general allegations, mandating the dismissal of the Petition of Appeal in its entirety as a matter of New Jersey law.

The fatal deficiency of Petitioner's pleading lies in its total reliance on generalized allegations in the nature of conclusions, without detailed supportive factual allegations. The necessity for detailed specific allegations in support of conclusions flows essentially from the fundamental New Jersey legal principle that in determining not to re-employ a non-tenured teacher, a local board of education is exercising a discretionary statutory function. For this reason the actions of a local board in this area are entitled to a presumption of correctness, thereby placing a burden on the petitioner to plead and prove affirmatively that the board's action was for proscribed reasons or was otherwise arbitrary, capricous or unreasonable. This presumption of board correctness, coupled with an affirmative obligation on a petitioner with respect to pleading and proof, is based upon a long line of judicial and administrative decisions: *Boult and Harris* v. *Board of Education of Passaic,* 135 N.J.L. 329 (Supreme Court 1947), aff'd 136 N.J.L. 521 (E. & A. 1948); *Schinck* v. *Board of Education of Westwood Consolidated School District,* 60 N.J. Super. 448, 476 (App. Div. 1960); *Quinlin* v. *Board of Education of North Bergen Township,* 73 N.J. Super. 40 (App. Div. 1962); *Thomas* v. *Morris Township Board of Education,* 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd. 46 N.J. 581 (1966); *Porcelli* v. *Titus,* 108 N.J. Super. 301 (App. Div. 1969), certif. den. 55 N.J. 310 (1970); *Joseph J. Dignan* v. *Board of Eduction of the Rumson-Fairhaven Regional High*

School District, App. Div. Docket No. A-444-74 (decided Oct. 10, 1975); *Inez Nettles* v. *Board of Education of the City of Bridgeton, Cumberland County*, 1976 *S.L.D.* 555, 560; *Patricia Peters* v. *Board of Education of the Township of North Brunswick, Middlesex County*, 1977 *S.L.D.* 72, 84 aff'd State Board of Ed. 1977 *S.L.D.* 85; *John C. Saccenti* v. *Board of Education of the Township of North Brunswick, Middlesex County*, 1977 *S.L.D.* 265, 280; *Michael R. Gearing* v. *Board of Education of the Borough of Manasquan, Monmouth County*, 1977 *S.L.D.* 751, 759; *Susan Zink* v. *Board of Education of the City of Salem, Salem County*, 1977 *S.L.D.* 1102, 1106; *Kathryn R. Fox* v. *Board of Education of the Watchung Hills Regional High School District, Somerset County*, 1977 *S.L.D.* 1107, 1112-13; *Nancy Sherwood* v. *Board of Education of the Township of Piscataway, Middlesex County*, 1977 *S.L.D.* 1226, 1234; *Margaret Perrault* v. *Board of Education of the Hopewell Valley Regional School District, Mercer County*, 1978 *S.L.D.*— (February 28, 1978), Slip Opinion at pages 2-3.

The instant Petition of Appeal simply failed to make the type of affirmative allegation necessary to overcome Respondent's presumption of correctness. Generalized allegations have never been accepted by the New Jersey Commissioner of Education, the New Jersey State Board of Education, or the New Jersey Courts. This is so, whether the generalized allegations pertain to allegedly false reasons, alleged discrimination, alleged violation of constitutional rights, or alleged arbitrary or capricious action. A petition of appeal must be dismissed for insufficient pleading in the absence of detailed and specific allegations of instances which support the generalized conclusion that has been alleged. The New Jersey case most frequently cited for this proposition is *Winston* v. *Board of Ed. South Plainfield*, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582

(1974). In *Winston*, the Appellate Division of the New Jersey Superior Court clearly stated that "the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions." 125 N.J. Super. at 144.

The New Jersey Commissioner of Education has consistently followed the reasoning of the Court in *Winston* in dismissing petitions for insufficiently specific pleadings supportive of general allegations. The first such case was *Barbara Hicks* v. *Board of Education of the Township of Pemberton, Burlington County*, 1975 *S.L.D.* 332, where the Commissioner stated (at 336):

> "When a teaching staff member alleges that a local board of education has refused re-employment for proscribed reasons (i.e. race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the Board was arbitrary and capricious or abused its discretion, *and is able to provide adequately detailed specific instances of such allegations*, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding." (Emphasis Added).

The underlined portion of the above quotation has been consistently relied upon by the Commissioner to dismiss petitions lacking the required supportive detailed allegations. *Mary C. Donaldson* v. *Board of Education of the City of North Wildwood, Cape May County*, 1976 *S.L.D.* 60, 64, aff'd State Board of Ed. 1976 *S.L.D.* 65; *Iris Sachs* v. *Board of Education of the East Windsor Regional School District, Mercer County, et al.*, 1976 *S.L.D.* 170, 172-3, aff'd State Board of Ed. 1976 *S.L.D.* 175; *John C. Roy, II* v. *Board of Education of the Township of Middle, Cape May County*, 1976 *S.L.D.* 569, 572, aff'd State Board of Ed. 1976

S.L.D. 574; *Dee Foster, et al.* v. *Board of Eduaction of the Township of Neptune, Monmouth County,* 1976 *S.L.D.* 693, 697; *Carol Sulovsky* v. *Board of Education of the Town of West Orange, Essex County,* 1976 *S.L.D.* 1075, 1081-82; *Jacqueline Nasuti et al.* v. *Board of Education of West Amwell, Hunterdon County,* 1979 *S.L.D.*—(January 9, 1979), Slip Opinion at p. 11.

The distinction between a bald conclusion that has been alleged, as against a detailed specific factual allegation, was highlighted by the Commissioner when he stated "in the absence of specific allegations with respect to petitioner's conclusion that the Board's action of not re-employing her was based on constitutionally proscribed reasons, an adversary hearing is not warranted." *Alice W. Cardman, et al.* v. *Board of Education of the Township of Millburn, Essex County,* 1977 *S.L.D.* 746, 749-50.

For additional cases where the Commissioner dismissed a petition for failure to provide affirmative offers of proof containing sufficiently detailed allegations, see: *Claire Haberman* v. *Board of Education of the Borough of Morris Plains, Morris County,* 1975, S.L.D. 848, 855, citing *Joan Sherman* v. *Malcolm Connor, et al.,* App. Div. Docket No. A-2122-73 (decided Janu. 28, 1975); *Mary Ann McCormack, et al.* v. *Board of Education of the Northern Highlands Regional High School District, Bergen County, et al.,* 1976 S.L.D. 754, 759, aff'd. State Board of Ed. 1977 S.L.D. 1299; *Michael R. Gearing* v. *Board of Education of the Borough of Manasquan, Monmouth County, supra,* 1977 S.L.D. 751, 758; *Kathryn R. Fox* v. *Board of Eduction of the Watchung Hills Regional High School District, Somerset County, supra,* 1977 S.L.D. 1107, 1110-11.

The foregoing legal principles, applied to the instant original Petition of Appeal, mandated dismissal. The

original Petition of Appeal, even when read most favorably to Petitioner, contained nothing more or less than bare unsupported generalized allegations of conduct by Respondent characterized as knowingly and intentionally false, discriminatory, in violation of Petitioner's constitutional rights, on account of Petitioner's national origin, or in retaliation for unnamed events which occurred in 1978. Clearly, each and every one of these allegations is simply a generalized unsupported conclusion. The following statement by the New Jersey Commissioner in *Kathryn R. Fox, supra,* 1977 S.L.D. at pages 1110-11, is equally applicable herein:

> "Petitioner contends that her constitutional rights were violated but fails to detail • • • a single instance supportive of a conclusion that such violation may have occurred. • • • In the instant matter petitioner has failed to offer detailed instances which would lend credence to her generalized allegation that her constitutional rights were violated. Nor is there a showing either that her due process rights were violated or that the statutes were violated. The Commissioner determines that such bare assertion provides no basis for cause of action • • •."

Petitioner's Amended Petition of Appeal was filed for the ostensible purpose of adding allegations of specific overt acts supportive of his national origin and discrimination claim. However, the new allegations set forth in the Amended Petition of Appeal also failed to meet the requisite standards of pleadings.

Paragraphs 5 and 6 of the Amended Petition alleged that in May, 1978 Petitioner was reassigned to the Junior High School and informed that he would teach General

Science in the 1978-79 school year, and that Petitioner's Department Chairperson informed Petitioner that the transfer was the first step toward his non-renewal for school year 1979-80 and warned him to be on guard. In response to these paragraphs, Respondent admitted that Petitioner was transferred from High School Physics teacher to Junior High School Physical Science teacher commencing in September 1978, but denied that the transfer was the first step toward his non-renewal for 1979-80, and stated that it lacked knowledge concerning the statements attributed to Petitioner's Department Chairperson. However, even if all the allegations set forth above were true, Respondent is at a loss to perceive any logical or legal nexus between these allegations and Petitioner's claim of discrimination on account of his national origin. Respondent asks rhetorically: How does a transfer from High School physics to Junior High School physical science constitute a specific overt act supportive of Petitioner's national origin discrimination claim? Likewise, even if the transfer was *arguendo* the "first step" towards Petitioner's eventual non-renewal, how can that have any different bearing on the legal sufficiency of the pleadings than Petitioner's actual non-renewal itself, which had already been pleaded in the original Petition?

Paragraph 5 of the original Petition alleged that during the 1978-79 school year Petitioner's evaluation contained criticism of his speaking. The Amended Petition adds to this allegation by merely setting forth in paragraphs 7 through 9 some of the specific comments contained in the evaluations concerning Petitioner's language difficulties, and also alleges that Petitioner's new Department Chairperson "had not been privy to the incidents of the previous spring." The meaning and relevance of the latter allegation has frankly elluded Respondent throughout these pro-

ceedings. As to the remaining allegations, however, how can the specific comments concerning Petitioner's language difficulties have any different bearing on the legal sufficiency of the pleadings than the general allegation previously set forth in his original Petition? A teacher's ability or inability to adequately communicate in the English language is indisputably an appropriate criterion upon which to evaluate the quality of his teaching performance. A negative evaluation based upon this concededly proper criterion, standing alone, thus simply does not constitute a specific overt act of national origin discrimination. The legal insufficiency of such an allegation is certainly not altered—and *a fortiori* not cured—by simply particularizing the pertinent comments contained in the evaluation.

At p. 24 of the instant Petition it is argued that the Administrative Law Judge erred in failing to deal with Petitioner's "allegation that his speaking and usage of the English language is not at all deficient". Petitioner argues that in passing upon Respondent's Motion to Dismiss, the Administrative Law Judge "should have accepted the allegations of the Petition as true". The difficulty with this approach is that Petitioner nowhere in his original Petition of Appeal or his Amended Petition of Appeal made any such allegation. Rather, all that was alleged, and therefore all that the Administrative Law Judge accepted as true, was that Respondent gave as the reasons for Petitioner's non-renewal his deficiencies in verbal presentation and English enunciation (among other things). The Administrative Law Judge did not assume that Petitioner was deficient in language, but rather assumed that that was the reason advanced by Respondent in failing to renew his employment. In actuality, the only conclusion drawn by the Administrative Law Judge with respect to language proficiency, and which conclusion is clearly correct, is that in the absence of additional facts not present herein, the

non-renewal of a teacher based upon a perceived deficiency in speaking and using the English language is a perfectly proper reason for such personnel action on the part of a local board of education.

CONCLUSION

For the reasons hereinabove set forth, the petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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